

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAY -2 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellant,)	2 CA-CR 2007-0132
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
PAGE GRAINGER STUART,)	Rule 111, Rules of
)	the Supreme Court
Appellee.)	
)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20060125

Honorable Robert Duber II, Judge

REVERSED

Daisy Flores, Gila County Attorney
By June Ava Florescue

Globe
Attorneys for Appellant

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By Sherry Bell and Zachary Mushkatel

Phoenix
Attorneys for Appellee

H O W A R D, Presiding Judge.

¶1 The state appeals from the trial court's order granting appellee Page Stuart's motion to suppress evidence, contending the trial court erred in finding Stuart was detained without reasonable suspicion following a legitimate traffic stop. Because we conclude

reasonable suspicion supported a continued detention, there was no constitutional violation, and the trial court erred in granting Stuart's motion to suppress. Accordingly, we reverse.

Facts and Procedural History

¶2 In reviewing the grant of a motion to suppress based on exclusionary principles, we view the evidence presented at the evidentiary hearing and any reasonable inferences from it in the light most favorable to upholding the trial court's order. *See State v. Hackman*, 189 Ariz. 505, 508-09, 943 P.2d 865, 868-67 (App. 1997). In this case, the following facts were undisputed. At approximately 9:30 a.m., Gila County sheriff's deputy Travis Baxley stopped Stuart after the loaded car trailer Stuart had been hauling swerved across the center line and onto the shoulder of the highway. Baxley was assigned to the Gila County sheriff's K-9 unit and had a drug-detection dog with him in his patrol vehicle. Stuart pulled to the side of the road; produced his license, proof of insurance, registration, and log book; and explained that he was having a problem with one of the trailer's axles. During the ensuing conversation, and in response to Baxley's questions, Stuart told Baxley the following: he was working for an employer in Casa Grande, Arizona; the trailer was his, but the truck he was driving was not; he had picked up the vehicles that were on the trailer in Marana, Arizona, and was taking them to different locations in Ohio; the vehicles had been loaded for him, one of them had a faulty transmission, and he did not have keys to them; his employer was paying for the gasoline; and he was to be compensated \$1,500 each way for the trip. Baxley also asked for and reviewed "paperwork" on the vehicles that showed at least one of the cars had already been registered in Ohio.

¶3 Baxley issued Stuart a warning for the traffic violation at approximately 9:50 a.m. He then asked Stuart a series of questions, including whether he had any marijuana or other drugs and whether Baxley could search the truck Stuart was driving and the vehicles on the trailer. Stuart gave Baxley permission to search the truck but not the vehicles on the trailer. Baxley searched the truck, finishing at approximately 10:10 a.m. and finding nothing incriminating. He had told Stuart he was going to “run [his] dog” around the vehicles on the trailer, and Stuart responded that he “guess[ed he could not] keep [Baxley] from it.” Baxley checked the trailer for the safety of his dog and then led the dog around the vehicles on the trailer. The dog “alerted” on at least two of the cars on the trailer, and approximately 2,000 pounds of marijuana was found.

¶4 Baxley testified that, as of the time of the hearing, he had been with the Gila County sheriff’s office for over sixteen years and had conducted approximately twenty-five to thirty traffic stops specifically involving trucks hauling other vehicles. He testified that he had become suspicious that Stuart was engaged in illegal activity because: Stuart appeared nervous during the traffic stop and attempted to control the conversation; based on Baxley’s experience, Stuart was making an unusually large amount of money for the trip, and two of the vehicles Stuart was hauling did not appear valuable enough for the trip to make financial sense; and also based on his experience, Baxley believed it was unusual for Stuart not to have the keys to the vehicles on his trailer. Baxley testified that his suspicion increased when the only time Stuart broke eye contact with him during their conversations was when Baxley asked about marijuana, a sign Baxley believed indicated Stuart was lying.

Baxley testified that Stuart had been free to leave after Baxley gave him the written warning, although he also testified that the “trailer wasn’t going to leave.”

¶5 Following the evidentiary hearing, the trial court found that Baxley had “determined . . . [Stuart] was not free to leave . . . immediately following his issuance of the warning.” The court then questioned whether Baxley had had reasonable suspicion to extend the stop at that time and allowed additional briefing on that point. After reviewing the additional briefing, the trial court issued a minute entry order granting Stuart’s motion to suppress. It found that Baxley had seized the vehicles on the car trailer when he had determined Stuart was not free to leave with them and that, therefore, “the lawfulness of the seizure turn[ed] o[n] the facts and circumstances known to [Baxley] at that time.” Relying on *United States v. Mendez*, 467 F.3d 1162 (9th Cir. 2006), an opinion that has since been withdrawn and superseded, *see* 476 F.3d 1077, 1078 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2277 (2007), the court also found that:

Questions about where [Stuart] was going, how much he was being paid, who owned the vehicles on the trailer, whether there was “paperwork” on the vehicles, how long [Stuart] would be traveling, whether [Stuart] had keys to the vehicles, and requests to examine the driver’s log book, were all beyond the scope of the purpose of the traffic stop and might be best described as a “fishing expedition”. . . . The Court concludes that without the answers to those questions, the information volunteered to Officer Baxley by [Stuart] and observed by Officer Baxley (which was available to the Court through the video tape and the stipulated transcript) was insufficient to establish specific articulable facts for the detention of [Stuart] to conduct a dog sniff.

Following the trial court's grant of Stuart's motion to suppress, the state filed a motion to dismiss the charges against Stuart without prejudice. The trial court granted the state's motion, and this appeal followed.

Discussion

¶6 The state argues the trial court erred by finding that Stuart had been seized after the traffic stop without reasonable suspicion. Following a routine traffic stop, a “driver must be permitted to proceed on his way without further delay or questioning unless” the detention has evolved into a consensual encounter or, ““during the traffic stop[,] the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity.”” *State v. Teagle*, 217 Ariz. 17, ¶ 22, 170 P.3d 266, 272 (App. 2007), *quoting United States v. Mendez*, 118 F.3d 1426, 1430 (10th Cir. 1997). The trial court considers the totality of circumstances in determining if the officer had a particularized and objective basis for a detention and if the duration of the detention was reasonable. *See State v. O'Meara*, 197 Ariz. 328, ¶ 2, 4 P.3d 383, 384 (App. 1999), *approved*, 198 Ariz. 294, 9 P.3d 325 (2000). We review the trial court's ruling for an abuse of discretion, but we determine legal issues de novo. *See id.*; *see also State v. Rosengren*, 199 Ariz. 112, ¶¶ 2, 9, 14 P.3d 303, 306-07 (App. 2000).

¶7 The trial court found that, because Baxley had already determined at the time he issued the warning that Stuart was not free to leave with the trailer, a seizure beyond the traffic stop had occurred at that point. “Whether an encounter is a detention or a consensual encounter depends” not on a police officer's subjective intention, but on whether the officer's

“conduct would have conveyed to a reasonable person that he or she was not free to decline the officer’s requests or otherwise terminate the encounter.” *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996); *see also Ohio v. Robinette*, 519 U.S. 33, 38 (1996). “[M]ere police questioning does not constitute a seizure.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

¶8 In *State v. Box*, 205 Ariz. 492, ¶ 21, 73 P.3d 623, 629 (App. 2003), following a legal traffic stop and after having issued a written traffic violation warning, the officer asked the driver questions similar to those Baxley asked Stuart. *Id.* ¶¶ 4, 12, 22. We noted that, when the officer “returned [the driver’s] documents to him and handed him the written warning, [the driver] was free to leave. But the officer was equally free to ask [the driver] additional questions unrelated to the traffic stop.” *Id.* ¶ 21 (citation omitted); *see also Robinette*, 519 U.S. at 35-40 (police officer may ask driver whether driver is carrying drugs and for permission to search vehicle after concluding traffic stop).

¶9 In this case, immediately after issuing the warning, Baxley asked Stuart a series of questions, including whether Stuart was carrying marijuana. He also obtained Stuart’s permission to search Stuart’s truck, but not the vehicles on the car trailer. The trial court did not find, and the record does not show, that Baxley conveyed to Stuart his subjective intention to detain him before asking whether Stuart was carrying marijuana and for permission to search Stuart’s truck. Therefore, the record shows Stuart’s continued interaction with Baxley, through the search of the cab of the truck, was consensual. *See*

Box, 205 Ariz. 492, ¶ 21, 73 P.3d at 629. We conclude, therefore, that the trial court erred in determining that Stuart had been detained at that time.

¶10 Stuart was, however, clearly detained again at the time Baxley finished searching the truck; the state does not contend otherwise. Thus, Baxley was required to have reasonably suspected Stuart of illegal activity before this additional detention. “‘By definition, reasonable suspicion is something short of probable cause.’ Although ‘reasonable suspicion’ must be more than an inchoate ‘hunch,’ the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention.” *Teagle*, 217 Ariz. 17, ¶ 25, 170 P.3d at 272, *quoting State v. O’Meara*, 198 Ariz. 294, ¶ 10, 9 P.3d 325, 327 (2000).

¶11 The trial court apparently concluded that in determining whether reasonable suspicion existed, it could not consider all of the information Baxley had obtained because it found Baxley had elicited some of it through improper questioning unrelated to the basis for the traffic stop and following his issuance of the written warning.¹ But in doing so, the court relied on the first opinion in *Mendez*, which, as noted above, has since been withdrawn and superseded. *See* 476 F.3d at 1078. Under *Mendez II*, during a lawful traffic stop, an officer may ask questions unrelated to the basis of the stop without reasonable suspicion to support them as long as the questions do not prolong the duration of the stop. 476 F.3d at

¹In his answering brief, Stuart also mentions that the questioning violated *Miranda v. Arizona*, 384 U.S. 436 (1966). But the trial court did not so find. And because we determine that Stuart was not detained until after the questioning, *Miranda* would not apply. *See State v. Pettit*, 194 Ariz. 192, ¶ 15, 979 P.2d 5, 8 (App. 1998) (“A motorist subjected to a traffic stop is ordinarily not ‘in custody’ for *Miranda* purposes.”).

1080 (applying to traffic stops United States Supreme Court’s holding in *Muehler v. Mena*, 544 U.S. 93, 101 (2005), that “mere police questioning does not constitute a seizure,” requiring independent justification for questions). The trial court therefore abused its discretion by applying what ultimately was determined to be an erroneous legal standard. *See State v. Fodor*, 179 Ariz. 442, 448, 880 P.2d 662, 668 (App. 1994) (suppression order “reversible” if based on “an incorrect legal standard”).

¶12 A trial court is required to consider the totality of the circumstances in determining whether reasonable suspicion existed to justify a detention, *see Teagle*, 217 Ariz. 17, ¶¶ 25-26, 170 P.3d at 272-73, and Baxley’s questions were not improper. Stuart did not contend the questions Baxley had asked before issuing the warning had prolonged the stop, and nothing in the record establishes that they did. Accordingly, the trial court was required to consider these questions and answers in determining whether Baxley had reasonable suspicion to detain Stuart.

¶13 The trial court concluded that the information Baxley had obtained during the stop, particularly just after Baxley issued the warning, had been “significant,” implying the information Baxley possessed amounted to reasonable suspicion—an implicit conclusion with which we agree based on Baxley’s testimony described above. *See State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996) (reasonable suspicion is mixed question of law and fact we review de novo). Baxley had discovered Stuart was being paid what Baxley considered an inordinate amount of money to haul cars that appeared to have little value on a lengthy trip to Ohio; Stuart did not have keys to the cars; he was excessively nervous and

attempted to control the conversation; and he broke eye contact with Baxley when he denied possessing marijuana. At the evidentiary hearing, Stuart did not offer any evidence contradicting Baxley's testimony, nor did the trial court make any negative findings as to Baxley's experience or credibility. We conclude therefore that reasonable suspicion supported Stuart's continued investigatory detention.

¶14 Thus we conclude the trial court abused its discretion in granting Stuart's motion to suppress evidence, and we reverse the trial court's order.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge